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No. 01-1231

In the Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL., PETITIONERS

v.

JOHN DOE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on their current dangerousness.

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INTEREST OF THE UNITED STATES

The court of appeals in this case held that Connecticut's sex offender registration and notification law—its "Megan's law"—violates the Due Process Clause of the Fourteenth Amendment. The Connecticut law requires those convicted of sex offenses to register with the State upon their release into the community, and provides for public dissemination of the sex offender registry. The court of appeals invalidated that law on the ground that due process entitles convicted sex offenders to an individualized hearing on their current dangerousness before a State may include them in a publicly disseminated registry.

The Megan's law at issue in this case qualifies Connecticut to receive federal funding pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender

Registration Program (Wetterling Act), 42 U.S.C. 14071 (1994 & Supp. V 1999). The Wetterling Act establishes minimum national standards for state sex offender registration and notification laws. In particular, the Act directs States to "release relevant information that is necessary to protect the public concerning a specific person required to register under [the Act]." 42 U.S.C. 14071(e)(2) (Supp. V 1999). States that do not meet the Act's minimum standards are ineligible to receive ten percent of a formula grant to which they are otherwise entitled under the Edward Byrne Memorial State and Local Law Enforcement Program, 42 U.S.C. 3756. See 42 U.S.C. 14071(g)(2)(A) (Supp. V 1999).

The Attorney General has issued guidelines implementing the Wetterling Act. 64 Fed. Reg. 572 (1999). The guidelines permit States to choose among different methods for classifying sex offenders and notifying the public of registered offenders. In particular, the guidelines provide that "States * * * are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." *Id.* at 582. The guidelines also permit States to make "particularized risk assessments of registered offenders," and notify the community depending on an offender's particularized risk level. *Ibid.*

All 50 States have enacted Megan's laws. More than 20 States, including Connecticut, have chosen to adopt the categorical notification approach expressly permitted by the Justice Department Guidelines under which the State's database of registered sex offenders is publicly disseminated, without any individualized risk assessments. See note 4, *infra*. In addition, Congress has enacted the Campus Sex Crimes Prevention Act of 2000 (CSCPA), Pub. L. No. 106-386, § 1601, 114 Stat. 1537, amending 42 U.S.C. 14071(j) and 20 U.S.C. 1092(f)(1) (1994 & Supp. V 1999). That Act, which

takes effect in October 2002, requires States to ensure community notification with respect to all registered sex offenders that are enrolled in or employed by an institution of higher education, without regard to individualized risk assessments. See 20 U.S.C. 1092 note; H.R. Conf. Rep. No. 939, 106th Cong., 2d Sess. 110 (2000).

The United States has a strong interest in defending the constitutionality of Megan's laws such as Connecticut's that comply with the federal guidelines, and in defending the constitutionality of the notification provision of the CSCPA, which operates in a fashion similar to Connecticut's program. More generally, the federal government has a substantial interest in ensuring that policymakers in the States and Congress may choose among all available and permissible means in determining how to protect communities, and in particular children, from sex offenders.

STATEMENT

1. Sex offenders inflict an immense toll on this Nation and its citizens. In 1995, nearly 355,000 rapes and sexual assaults were reported nationwide by victims older than 12 years. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997); see U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 24 (1999).[1] Between 1980 and 1994, the average number of individuals imprisoned for sex offenses increased at a faster rate than that for any other category of violent crime. *Sex Offenses and Offenders* 18. In 1994, nearly 100,000 inmates were serving time in state prisons for rape or sexual assault; another 134,000 convicted sex offenders were under community supervision, such as probation or parole. *Id.* at 15.

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[1] These figures understate the incidence of sex offenses because many sex offenses go unreported and others involve children under the age of 12, who are not covered by this survey.

More than 42,000 of those inmates victimized children. U.S. Dep't of Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 2 (1996).

Even when they do not result in serious physical injury or death, sexual assaults inflict enormous harm on victims, especially children. Children who are sexually assaulted are more likely than other children to develop severe psychosocial problems, including depression, antisocial and suicidal behavior, and substance abuse, and are more likely to become involved in abusive relationships. See J. Briere & M. Runtz, *Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment*, 8 J. of Interpersonal Violence 312, 324 (Sept. 1993). In addition, children who are sexually assaulted are more likely than other youths to become sex offenders as adults. *Id.* at 312.

Convicted sex offenders are much more likely to recommit sex offenses than any other type of felon. See *Sex Offenses and Offenders* 27; U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* 6 (1997). One study of 16,000 state prisoners showed that within just three years of release, 7.7% of released rapists had been rearrested for rape, and 27.5% of released rapists had been rearrested for another violent offense, including murder. *Id.* at 3. Released rapists were 10.5 times more likely to be rearrested for the crime of conviction than other released prisoners; likewise, prisoners who had served time for other sexual assaults were 7.5 times more likely than other released prisoners to be rearrested for the crime of conviction. *Ibid.* Those who commit sex offenses against children present an even heightened risk of recidivism. See *Child Victimizers* 9-10.

Like every other State, Connecticut has enacted a Megan's law designed to protect its communities from sex offenses, assist law enforcement authorities in apprehending sex offenders, and comply with federal funding mandates.

The Connecticut law requires persons convicted of certain offenses, the vast majority of which are sex-based, to register with the Connecticut Department of Public Safety (CDPS or State) upon their release into the community. Registrants must provide their name and address, identifying information such as a photograph and DNA sample, and certain other information. The registration requirement runs for ten years, except that those convicted of sexually violent offenses must register for life. Covered individuals must re-register when they move, and periodically must submit an updated photograph. See Conn. Gen. Stat. Ann. §§ 54-251, 54-252, 54-254 (West 2001); Pet. App. A5-A7.[2]

The Connecticut law requires the CDPS to compile the information gathered from registrants and to share it with law enforcement authorities and the public. In particular, the law requires CDPS to post a sex offender registry on an Internet website and make it available to the public in certain state offices. See Conn. Gen. Stat. Ann. §§ 54-257, 54-258 (West 2001); Pet. App. A7-A9. Whether made available in person or via the Internet, the registry must be accompanied by the following warning: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Conn. Gen. Stat. Ann. § 54-258a (West 2001).

In Connecticut, as in most other States, the Internet served as the primary means of accessing the State's sex offender registry. The State's website enabled citizens to obtain the name and address, photograph, and physical description of any registered sex offender by entering a zip

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[2] In certain instances not at issue here, a court may determine that "registration is not required for public safety." Conn. Gen. Stat. Ann. § 54-251(b) and (c) (West 2001); see Pet. App. A10.

code or town. Pet. App. A8-A9. The following disclaimer appeared on the first page of the website:

> The registry is based on the legislature's decision to facilitate access to publicly available information about persons convicted of sexual offenses. The [CDPS] has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.

Id. at A9.

3. Respondent is a Connecticut resident who has been convicted of an offense that is covered by Connecticut's Megan's law. In 1999, he filed this Section 1983 action on behalf of himself and similarly situated individuals, claiming that the Connecticut law violates the Due Process Clause of the Fourteenth Amendment. Respondent alleged that he is not a "dangerous sexual offender," and that the Connecticut law "deprives him of a liberty interest—his reputation combined with the alteration of his status under state law—without notice or a meaningful opportunity to be heard." Pet. App. A11. The district court granted summary judgment for respondent on his due process claim. *Id.* at A41-A66. Shortly thereafter, the court issued an order certifying a class of individuals subject to Connecticut's Megan's law, and permanently enjoining the public notification provisions of that law. *Id.* at A67-A69.

4. The Second Circuit affirmed. Pet. App. A1-A40. The court stated that the due process claim was "govern[ed]" (*id.* at A14) by *Paul* v. *Davis*, 424 U.S. 693 (1976). According to the court, to prevail under *Paul*'s "'stigma plus' test," respondent was required to show that the State made a "stigmatizing statement" about him that he claimed was false; and "some tangible and material state-imposed burden or alteration of his * * * status or of a right in addition to the stigmatizing statement." Pet. App. A14.

Applying that formulation of *Paul*, the court of appeals found that, although the information listed on the State's registry is "concededly true," Pet. App. A15, the registry conveys the "stigma" that "each person listed is more likely than the average person to be currently dangerous." *Id.* at A18. According to the court, the website's disclaimer did not remove that asserted stigma, but instead contributed to it. See *id.* at A17 ("Even the disclaimer itself, by asserting that the DPS 'has made no determination that any individual included in the Registry is currently dangerous,' clearly implies that some may be.").

Although the court stated that "the import of the 'plus' component [of *Paul*] remains somewhat unclear," Pet. App. A20, it further concluded that the "registration duties" under Connecticut's Megan's law, which it characterized as "extreme and onerous," "easily qualify as a 'plus' factor under *Paul*," *id.* at A30-A31. In so holding, the court recognized that "the Sixth and Ninth Circuits have not found a liberty interest [under *Paul*] in analogous circumstances." *Id.* at A32 (citing *Cutshall* v. *Sundquist*, 193 F.3d 466, 479-480 (6th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); and *Russell* v. *Gregoire*, 124 F.3d 1079 (9th Cir. 1997), cert. denied, 523 U.S. 1007 (1998)).

The court of appeals affirmed the district court's injunction against the notification provisions of the Connecticut law, and stated that "[respondent] and members of the due process class are entitled to the opportunity to have a hearing consistent with due process principles to determine

whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in the publicly disseminated registry." Pet. App. A39.[3]

ARGUMENT

The Second Circuit's decision in this case holding that Connecticut's Megan's law violates the Due Process Clause casts doubt on the validity of the federal guidelines issued pursuant to the Wetterling Act, which specifically endorse the type of categorical notification approach invalidated by the court. More than 20 States have adopted versions of Megan's law that require community notification based on the fact of an individual's prior conviction for a sex offense, rather than an individualized, post-conviction risk assessment. In addition, the CSCPA directs all States to begin using a similar notification approach next fall with respect to registered sex offenders who enter a campus community.

The Second Circuit's decision in this case also conflicts with this Court's precedents, including *Paul* v. *Davis*, 424 U.S. 693 (1976), and with the decisions of other circuits. In light of the vital importance of Megan's laws to public safety and the demonstrated interest of both federal and state legislators in addressing the serious problem of recidivism among convicted sex offenders, this Court should resolve that conflict now and provide needed guidance on whether the Constitution prevents a State from affording its citizens access to its sex offender registry unless it first guarantees each registered sex offender an individualized hearing on his current dangerousness.

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[3] Respondent also alleged that the Connecticut law subjects him to an additional punishment for conduct that preceded the date on which the law took effect, in violation of the Ex Post Facto Clause. U.S. Const. Art. I, § 10. The district court rejected that claim, Pet. App. A57, and the court of appeals did not reach it, see *id.* at A38. Accordingly, the State has not presented the ex post facto issue to this Court. See Pet. i.

A. The Question Presented Is Of National Importance

Megan's laws serve vital government interests by assisting law enforcement and enabling American communities to better protect themselves, and in particular their children, from sex offenses. As discussed above, Congress has sought to encourage all States to enact Megan's laws by tying state eligibility for federal funding to the enactment of sex offender registration and notification provisions that meet minimum national standards. The federal guidelines promulgated pursuant to the Wetterling Act specifically provide that States "are free under the Act" to notify the public of registered sex offenders on a categorical basis depending on the fact of conviction for a particular offense. 64 Fed. Reg. at 582. More than 20 States, including Connecticut, have opted to follow such a categorical notification approach.[4]

The federal guidelines also permit States to notify communities of registered sex offenders based upon a "particularized risk assessment[] of [such] offenders." 64 Fed. Reg. at 582. States like Connecticut, however, have concluded

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[4] See, *e.g.*, Ala. Code §§ 15-20-21(1), 15-20-25(b) (Supp. 2000); Del. Code Ann. tit. 11, § 4121(e) (Supp. 2000); D.C. Code § 22-4001 (2001); Fla. Stat. Ann. §§ 943.043(1), 943.0435(1)(a) (West 2001); Ga. Code Ann. § 42-9-44.1 (1997); Haw. Rev. Stat. § 846E-3 (Supp. 2000) (invalidated in *State* v. *Bani*, 36 P.3d 1255 (Haw. 2001)); 173 Ill. Comp. Stat. Ann. 152/115, 152/120(c) (West Supp. 2001); Ind. Code Ann. § 5-2-12-11(b) (Michie 2001); La. Rev. Stat. Ann. § 15:546 (West 2001); 2001 Md. Laws ch. 10, § 2 (revising Md. Ann. Code art. 27, § 792 (Supp. 2000)); Mich. Comp. Laws Ann. § 28.728(2) (West 2001); Miss. Code Ann. § 45-33-49 (Supp. 2001); Mo. Ann. Stat. § 589.417(2) (West Supp. 2002); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (1993); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (1999); S.C. Code Ann. Rev. § 23-3-490 (2002); Tenn. Code Ann. § 40-39-106(f) (1997); Tex. Code Crim. P. Ann. art. 62.08 (West Supp. 2002); Utah Code Ann. § 77-27-21.5 (2001); Va. Code Ann. § 19.2-390.1(B)-(D) (Michie 2002); W. Va. Code § 15-12-2(h) (2000); and Wis. Stat. Ann. § 301.46(5) (West 1999); see generally *Helman* v. *State*, 784 A.2d 1058, 1065-1066 & n.2 (Del. 2001) (citing state statutes).

that basing community notification on an individualized assessment concerning each convicted sex offender's "likelihood to reoffend" is "costly, cumbersome and inaccurate," and such States have therefore have declined "to distinguish the level of information [made available to the public] with regard to any individual registrant based upon any such [assessment]." Pet. 4-5. That is a judgment that the federal guidelines plainly permit States to make and, as discussed below, is one that is amply supported by experience and common sense. See pp. 15-16, *infra*.

The court of appeals in this case acknowledged that "Connecticut's registration and notification system is compliant with * * * the federal standards," Pet. App. A5 n.5, but held that the Due Process Clause nonetheless required the State to afford convicted sex offenders an individualized hearing "to determine whether or not they are particularly likely to be currently dangerous" before listing them in its publicly disseminated registry, *id.* at A39. Thus, although the federal guidelines were not directly challenged in this case, the decision below effectively holds that the Constitution forbids what the federal guidelines permit.

Likewise, if followed, the decision in this case would cast serious doubt on the notification provision of the CSCPA, which takes effect this October. In enacting the CSCPA, Congress directed States to provide for community notification with respect to *all* registered sex offenders enrolled in or employed by an institution of higher education, without regard to particularized risk assessments. See pp. 2-3, *supra*. The CSCPA, therefore, will be under a constitutional cloud in the Second Circuit as soon as it takes effect. As a result, scores of college communities in the Second Circuit alone could be adversely affected by the decision in this case.

B. The Court Of Appeals' Decision Conflicts With This Court's Decisions

The Second Circuit's decision below conflicts with this Court's precedents in at least two fundamental respects.

1. The decision conflicts with this Court's decision in *Paul* v. *Davis*, *supra*, which—as the Second Circuit recognized—most directly "governs" this case. Pet. App. A14. *Paul* involved an individual, Davis, whose name and photograph were included on a police flyer of "Active Shoplifters," following his arrest for shoplifting. 424 U.S. at 695. After the shoplifting charge was dismissed, Davis brought suit under Section 1983 against the officers responsible for the flyer, claiming that the public distribution of the flyer had inflicted a stigma on his reputation that would "seriously impair his future employment opportunities," and thereby deprived him of a "'liberty' protected by the Fourteenth Amendment." *Id.* at 697; see *id.* at 699.

This Court disagreed, and held that the interest in one's reputation, standing alone, is not protected by the Due Process Clause. See 424 U.S. at 711-712. The Court explained that the customary recourse for "the infliction by state officials of a 'stigma' to one's reputation" is state defamation law. *Id.* at 701. To trigger due process guarantees, an individual must show that he has been deprived of an interest that is "recognized and protected by state law." *Id.* at 710. That is, an individual must show that "*as a result of the state action complained of*, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711 (emphasis added). Davis failed to make such a showing, the Court held, because he did not "assert denial of any right vouchsafed to him by the State," but instead only a harm to his reputation. *Id.* at 712.[5]

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[5] The Court reaffirmed that understanding of *Paul* in *Siegert* v. *Gilley*, 500 U.S. 226 (1991). See *id.* at 233-234. In *Siegert*, the Court held

By contrast, as the Court explained in *Paul*, the plaintiff in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), suffered a change in status that triggered due process. *Constantineau* involved a challenge to a state law that required the "posting" of the names of individuals deemed to pose a community risk by reason of "excessive drinking." *Id.* at 434-435. The law further made it unlawful to sell or give liquor to "posted" individuals. *Id.* at 434 n.2. As the Court explained in *Paul*, the "posting" at issue in *Constantineau* "significantly altered [an individual's] status as a matter of state law" by depriving him of "the right to purchase or obtain liquor in common with the rest of the citizenry," and "it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 U.S. at 708-709.

The "state action complained of" (*Paul*, 424 U.S. at 711) in this case is community notification of respondent's inclusion in the State's sex offender registry, and the alleged stigma flowing therefrom. See Pet. App. A18.[6] To trigger due process protections under *Paul*, respondent was required to show the material alteration in a state entitlement or right "as a result of" the notification of his registered sex offender status. 424 U.S. at 711. In holding that respondent met that

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that the plaintiff had failed to state a claim under the Fourteenth Amendment based on an allegedly defamatory letter sent by his former government employer to a prospective employer. In so holding, the Court reiterated that "[d]efamation, by itself, is * * * not a constitutional deprivation," and concluded that, under *Paul*, the plaintiff had failed to state a claim, even though "[t]he statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects." *Id.* at 233-234.

[6] As the court of appeals recognized, it is "[p]ublication of the Connecticut Sex Offender Registry" that "stigmatizes" the listed sex offenders. Pet. App. A18. Thus, the injunction affirmed below is "limited to public disclosure of the sexual offender registry." *Id.* at A38.

test, the Second Circuit pointed to the "registration duties imposed by Connecticut's sex offender law." Pet. App. A30. But that analysis confuses cause and effect. Registration is not a result of notification—*i.e.*, the complained of action. Just the opposite is true. Moreover, the effect on respondent would be no different if the State notified the community of the fact of his conviction, rather than the fact of his registration. In either case, no change in state law status is triggered by the notification. Like Davis, respondent was not "deni[ed] * * * any right vouchsafed to him by the State" as a result of the complained of action and, so too, he was not deprived of any interest protected by the Fourteenth Amendment. *Id.* at 712.

The Second Circuit held that *Paul*'s "plus factor" is met if a plaintiff "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." Pet. App. A29. That is a substantial deviation from the line drawn by *Paul*, and provides virtually no limiting principle against transforming ordinary defamation claims against a State into constitutionally recognized defamation claims. Indeed, if all that is required to trigger due process protections is "an indicium of material government involvement unique to the government's public role," then the State's public role in notifying the community of individuals who have been apprehended for particular offenses (*e.g.*, shoplifting) as part of legitimate law enforcement efforts also would trigger the Fourteenth Amendment. But *Paul* teaches that the contrary is true.[7]

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[7] This case is an even *less* likely candidate than *Paul* for finding a constitutionally recognized tort. The police flyer in *Paul* identified Davis as an "Active Shoplifter," even though he had only been *charged* with shoplifting when it was distributed. 424 U.S. at 696. Moreover, "[s]hortly after circulation of the flyer," that charge was dismissed. *Ibid.* By contrast, this case involves public dissemination of information that is

2. Even assuming (contrary to the analysis above) that the challenged state action in this case implicates an interest protected by the Fourteenth Amendment, the Second Circuit's decision holding that respondent was entitled to an individualized hearing with respect to his current dangerousness nonetheless conflicts with this Court's decisions. As the plurality recognized in *Michael H.* v. *Gerald D.*, 491 U.S. 110, 120 (1989), States are not barred by principles of "*procedural* due process" from establishing a "conclusive presumption" or "general classification[]" that "foreclose[s] the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will not in fact further the lawful governmental policy the presumption is designed to effectuate." *Ibid.* Rather, such classifications, when they implicate protected interests, are limited only by *substantive* due process. *Id.* at 120-121.

Michael H. involved a challenge brought by the putative natural father to a state law establishing a conclusive presumption that the husband of the mother who was living with the mother was the "father" of the mother's child. 491

"concededly true." Pet. App. A15. The court of appeals accepted respondent's allegation that Connecticut's sex offender registry falsely implies that he is a "presently dangerous sex offender." *Ibid.* Even that alleged stigma, however, was dispelled by the disclaimer on the State's Internet website. In any event, the source of the alleged stigma here is not the registry, but rather the undisputed fact of respondent's *conviction* for a sex offense. This Court has never suggested that the Constitution is implicated by any stigma that may stem from the publication of truthful information, or that an individual is entitled to an individualized hearing before a State may publish such information for plainly legitimate public purposes. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977). To the contrary, the Court has recognized that the public interest may be *served* by disseminating truthful information obtained from court records. See *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 493, 495-496 (1975). And, in *Paul* itself the Court rejected the argument that the Constitution prevents a State from "publiciz[ing] a record of an official act such as an arrest." 424 U.S. at 713.

U.S. at 116-118. The plurality rejected the putative father's procedural due process argument that he was entitled to an "opportunity to demonstrate his paternity in an evidentiary hearing" before the State applied the foregoing rule to him, and terminated his parental rights. *Id.* at 119. Instead, the plurality reasoned that such a challenge "must ultimately be analyzed" under principles of substantive due process by looking to "the adequacy of the 'fit' between the classification and the policy that the classification serves." *Id.* at 121. Justice Stevens, who concurred in the judgment in *Michael H.*, joined the portion of the plurality decision rejecting the procedural due process claim. See *id.* at 132.

Similarly, here, to the extent that the State's decision to notify the public of *all* registered sex offenders (without any individualized inquiry into their present dangerousness) implicates any liberty interest enjoyed by respondent, that decision is at most subject to challenge under principles of substantive due process. When, as here, a classification does not infringe on a fundamental right or discriminate against a suspect class, it is subject to rational basis review, which looks deferentially to the "the 'fit' between the classification and the policy that the classification serves." *Michael H.*, 491 U.S. at 121; see *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997). Connecticut's decision to notify communities of all registered sex offenders is clearly rationally related to legitimate state objectives, and thus satisfies due process.

As the court of appeals recognized, Connecticut's Megan's law serves the important government objectives of protecting the public and assisting law enforcement. See Pet. App. A17. The State's categorical notification requirement is directly related to those objectives. Indeed, experience teaches that the fact that an individual has been convicted of a sex offense is perhaps the most significant factor for gauging his risk of committing another sex offense upon his release. See U.S. Sentencing Commission, *Report to the*

Congress: *Sex Offenses Against Children* 34 (June 1996) ("The most consistent finding is that criminal history, especially a history of sexual offenses, is the most important and accurate predictor of the risk of future sexual offending."); p. 4, *supra*. Moreover, any substantive due process claim in this case is particularly weak because, unlike in *Michael H.*, where parental rights were at stake, the only consequence of any presumption in Connecticut's categorical approach is public dissemination of truthful information, with individuals free to draw their own conclusions from that information.[8]

In short, nothing in the Due Process Clause requires a State individually to attempt to assess the particular degree of danger posed by each sex offender before it may publicly disseminate a registry of convicted sex offenders.

C. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Circuits

As the Second Circuit recognized, the decision in this case also conflicts with the decisions of other circuits. See Pet. App. A32. Those decisions, moreover, underscore the conflict between the decision below and *Paul*.

In *Russell* v. *Gregoire*, 124 F.3d 1079 (1997), cert. denied, 523 U.S. 1007 (1998), the Ninth Circuit rejected a constitutional challenge to the notification provision of Washington's Megan's law. Although the plaintiffs in that case framed their challenge in terms of a violation of "their right to privacy," in rejecting that claim the Ninth Circuit expressly relied upon this Court's decision in *Paul*, and reasoned that "[t]he collection and dissemination of information under the

[8] Following a categorical notification approach with respect to all registered sex offenders may encourage citizens to make their own judgments about the risks posed by particular sex offenders, without the imprimatur of a state determination that a particular offender poses a particular danger to his community based on the outcome of an individualized risk assessment.

Washington law * * * does not amount to a deprivation of liberty or property" under *Paul*. *Id.* at 1093-1094.

In *Cutshall* v. *Sundquist*, 193 F.3d 466, 478 (1999), cert. denied, 529 U.S. 1053 (2000), the Sixth Circuit rejected a procedural due process challenge to Tennessee's Megan's law, which was based on the plaintiff's assertion that the Tennessee law "infringe[d] protected liberty interests because it imposes punishment" and "subjects him to stigmitization and loss of employment." In so holding, the court emphasized that, under *Paul*, "reputation alone is not a constitutionally protected liberty or property interest" and that, to establish such an interest, "a plaintiff must show that the 'governmental action taken * * * deprived the individual of a right previously held under state law.'" *Id.* at 479 (citing *Paul*, 424 U.S. at 708).

The Second Circuit below acknowledged that *Russell* and *Cutshall* found no "liberty interest in analogous circumstances." Pet. App. A32. But the Second Circuit stated that the courts in *Russell* and *Cutshall* did not "necessarily disagree[] with the contention that the ongoing legal obligations of sex offender registrants constitute a 'plus' factor" under *Paul*. *Id.* at A31-A32. That is true only insofar as those courts did not explicitly reject, because they did not consider, the novel ground on which the Second Circuit rested its decision below. The Megan's laws challenged in *Russell* and *Cutshall* imposed the same type of registration duties as the Connecticut law in this case, but neither the Ninth nor Sixth Circuit regarded those duties as sufficient to trigger due process protections with respect to notification.[9]

[9] As the Second Circuit recognized, a "substantial number of district courts" also have rejected similar due process challenges to Megan's laws. Pet. App. A32; but see *Doe* v. *Williams*, 167 F. Supp. 2d 45, 55 (D.D.C. 2001) (holding that the notification provisions of District of Columbia's Megan's law violate procedural due process), appeal pending, No. 01-7162 (D.C. Cir. filed Feb. 21, 2002). The number of decisions involving due

D. *Otte* v. *Doe*, No. 01-729, Presents No Occasion To Resolve The Due Process Issue Presented By This Case

On February 19, 2002, this Court granted certiorari in *Otte* v. *Doe*, No. 01-729. The question in *Otte* is whether Alaska's Megan's law imposes punishment for purposes of the Ex Post Facto Clause. 01-729 Pet. at i. The Ninth Circuit held that the registration and notification provisions of Alaska's Megan's law violate the Ex Post Facto Clause by increasing the punishment for sex offenses for those who committed offenses prior to its enactment. See 01-729 Pet. App. at 30a-31a. The Ninth Circuit in *Otte* expressly declined to "resolve the question of whether [the Alaska law] also violates the Due Process Clause." See 01-729 Pet. App. at 2a.[10] As a result, *Otte* does not present an opportunity for the Court to address the important question presented here.

CONCLUSION

Granting certiorari in this case would enable the Court to provide guidance on the application of due process principles to Megan's laws, and provide additional clarity in this vitally important area. Given the recurring nature of litigation in the federal courts over the constitutionality of Megan's laws, it seems inevitable that this Court will have to address whether due process bars categorical community notification provisions such as those at issue in this case. Legislators in the States and Congress seeking to protect citizens from sex offenses would benefit from guidance from the Court on whether categorical notification is one of the measures available to them in undertaking such efforts.

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process challenges to Megan's laws underscores the important and recurring nature of the question presented here.

[10] Conversely, as noted above, the Second Circuit in this case did not reach respondent's ex post facto argument. Pet. App. A38.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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